STATE OF MICHIGAN

COURT OF APPEALS

METRO SERVICES ORGANIZATION, Plaintiff-Appellant,	UNPUBLISHED February 1, 2011
v	No. 292052 Wayne Circuit Court
CITY OF DETROIT, Defendant-Appellee.	LC No. 08-014413-CK

METRO SERVICES ORGANIZATION, Plaintiff-Appellant,	
v	No. 292588 Wayne Circuit Court
CITY OF DETROIT, Defendant-Appellee.	LC No. 08-018094-CK

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

PER CURIAM.

These consolidated appeals involve separate breach of contract claims brought by plaintiff Metro Services Organization against defendant City of Detroit. Plaintiff's suits aver that defendant neglected to pay for cleaning and electrical services that plaintiff performed at Cobo Hall (also referred to as "Cobo Civic Center"). In Docket No. 292052, plaintiff appeals as of right from a circuit court order in LC No. 08-014413-CK granting defendant summary disposition with respect to plaintiff's claim for breach of the cleaning services contract. In Docket No. 292588, plaintiff appeals as of right from a circuit court order in LC No. 08-018094-CK granting defendant summary disposition of plaintiff's claim for breach of the electrical services contract. In both cases, the court ruled the contracts void and unenforceable as contrary to public policy. In each case, we reverse and remand for further proceedings.

We review de novo a circuit court's summary disposition ruling. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). Although the court did not identify the particular subrule on which it relied in granting defendant's motions, because the court considered documentary evidence beyond the pleadings, we review the motions under MCR

2.116(C)(10). *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). We limit our review to the evidence presented to the circuit court at the time it decided the motions. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). Therefore, in considering plaintiff's challenge to the circuit court's decision on the cleaning services contract in Docket No. 292052, we decline to take into account the additional evidence that plaintiff subsequently offered in support of its motion for reconsideration. Pursuant to the same logic, we reject defendant's suggestion in each case that we take judicial notice of Karl Kado's plea agreement in a federal case and Kado's deposition testimony in a separate Wayne Circuit Court case, both of which occurred after the circuit court's summary disposition rulings in these cases.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim, as supported by documentation containing "content or substance [that] would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6); see also *Adair v Michigan*, 470 Mich 105, 120; 680 NW2d 386 (2004); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). The moving party bears the initial burden of substantiating its position with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b) and (4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to show a genuine issue of disputed fact for trial. *Id.*; *Innovative Adult Foster Care, Inc*, 285 Mich App at 475. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Med Ctr*, 277 Mich App at 56. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison*, 481 Mich at 425.

In Docket No. 292052, plaintiff complains that the circuit court made its summary disposition ruling before discovery occurred. "Although a motion for summary disposition is generally premature if granted before completing discovery regarding a disputed issue, if a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2006) (internal quotation omitted). For example, MCR 2.116(H)(1) permits a party to "show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure." See also *Coblentz v City of Novi*, 475 Mich 558, 570-571; 719 NW2d 73 (2006). Plaintiff apprised the circuit court of no specific evidence that it could not obtain but wanted to present by the time the circuit court ruled on defendant's motion for summary disposition of the cleaning services contract.

The court viewed the contracts as contravening public policy, and thus void and unenforceable.[1] In *Badon v Gen Motors Corp*, 188 Mich App 430, 439; 470 NW2d 436 (1991), this Court explained:

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[1] We need not address plaintiff's brief appellate reference to the cleaning services contract's (continued…)

> Public policy has been described as "the community common sense and common conscience, extended and applied throughout the State to matters of public morals, public health, public safety, public welfare, and the like." *Skutt v Grand Rapids*, 275 Mich 258, 264; 266 NW 344 (1936). It is expressed in the constitution, statutes, judicial decisions, or customs and conventions of the people, and it concerns the primary principles of equity and justice. *Id*. What public policy requires varies with the habits and fashions of the day. *Id*., pp 263-264; *McNamara v Gargett*, 68 Mich 454, 460-461; 36 NW 218 (1888).

In Michigan, whether a contract or contractual term violates public policy "depends upon its purpose and tendency and not upon an actual showing of public injury." *Federoff v Ewing*, 386 Mich 474, 480-481; 192 NW2d 242 (1971). "*The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of its courts.*" *Mahoney v Lincoln Brick Co*, 304 Mich 694, 706; 8 NW2d 883 (1943), quoting 17 CJS 211, pp 563-565 (emphasis in original).

Turning first to the cleaning services contract at issue in Docket No. 292052, the particular contract on which plaintiff relies as a basis for entitlement to $1.75 million in cleaning services comprises the sixth revision to purchase order no. 2578856, dated July 18, 2005. The amount of defendant's alleged liability is not at issue in this appeal, but we note that the relevant time period is July 2005, when the purchase order was revised to specify "contract increase approved for an additional $1,750,000," bringing the total approved amount for the contract period from April 1, 2002 to October 31, 2005 to $11,411,999. The purchase order obligated plaintiff to furnish various janitorial, ground maintenance, and other services. It lists both monthly ($220,472.05) and daily ($3,279.94) rates for plaintiff's services.

Plaintiff does not dispute on appeal that its officer, Karl Kado, made an illegal payment of nearly $100,000 to Cobo Hall's director, Efstathios Pavledes, in January 2003, followed by an illegal payment of $15,000 to a successor director, Glenn Blanton, in May 2005. Although plaintiff insists that the payments should rightly be characterized as extortion by public officials, instead of bribery, we fail to comprehend the materiality of this distinction for purposes of ascertaining whether defendant's alleged liability for $1.75 million under the revised purchase order should be enforced. In both instances, the crime involves the payment of money to a public official. *People v Ritholz*, 359 Mich 539, 552-553; 103 NW2d 481 (1960); see also MCL 750.214. A person may avoid both crimes in the same manner, by opting against making the payment to the public official. Furthermore, in cases of both bribery and extortion, a person's payment of money operates to the detriment of the public interest, which is all that Michigan law demands for declaring a contract unenforceable as against public policy based on criminal conduct. *Federoff*, 386 Mich at 481; *Mahoney*, 304 Mich at 705.

But the mere occurrence of some illegal conduct involving an entity's agent and a public official does not necessarily render *every* contract between the entity and public official void and unenforceable. Some connection must exist between the illegal conduct and the contract that

(…continued)

procurement by fraud, given that the circuit court did not rely on principles of fraud to find that either the cleaning services contract or the electrical services contract was void.

makes enforcement of the contract offensive to public policy. *Miller v Radikopf*, 394 Mich 83, 88-89; 228 NW2d 386 (1975); see also *Device Trading, Ltd v Viking Corp*, 105 Mich App 517, 520-521; 307 NW2d 362 (1981). In *Miller*, 394 Mich at 86-88, our Supreme Court found enforceable a contract to share the proceeds of an Irish Sweepstakes ticket because this agreement did not depend on prior illegal conduct of the contracting parties in their sale and acquisition of Irish Sweepstakes tickets, and enforcement of the contract to share the proceeds would not offend public policy. In reaching this conclusion, the Supreme Court distinguished the contract to share proceeds from other criminal enterprises:

> Agreements to share possible proceeds from Irish Sweepstakes tickets are not an "essential part" of the sale and distribution of those tickets. The continued success of the Irish Sweepstakes in this state is in no way dependent on the enforceability of agreements to share winnings. Miller's and Radikopf's collateral agreement to divide their prospective winnings was not an essential part of their sale and distribution of those tickets. Nor was their agreement dependent on illegal conduct in the acquisition of the lottery tickets; they might have acquired the tickets in a manner free of any suggestion of illegality and then entered into an agreement to share proceeds.
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> However this case is decided, the courts of this state will continue to refuse to entertain actions seeking an accounting of proceeds obtained from illegal enterprises such as the illegal sale of narcotics and bank robberies. Additionally, enforcement or an accounting will be denied, without regard to whether the proceeds sought to be divided have been legally obtained, if the consideration offered is illegal.
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> Judicial nonenforcement of agreements deemed against public policy is considered a deterrent for those who might otherwise become involved in such transactions. While nonenforcement . . . might tend to discourage people from agreeing to split their legal winnings, nonenforcement would not tend to discourage people from buying or selling Irish Sweepstakes tickets. Both Miller and Radikopf have been compensated for selling the tickets and Radikopf has received the winnings as the holder of a particular ticket. No interest of the state would be furthered by nonenforcement of Miller's claim that he is the owner of one-half of those legal winnings. [*Id*. at 88-89 (footnote omitted).]

In support of defendant's position that plaintiff engaged in unlawful conduct that rendered the cleaning services contract void, defendant relied primarily on evidence of Pavledes's and Blanton's plea agreements in federal criminal cases.[2] The plea documentation showed that Pavledes agreed to plead guilty to a charge of structuring a transaction to avoid currency reporting requirements, and that Pavledes acknowledged the following relevant factual basis for his plea:

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[2] Defendant also submitted a one-page information against Kado, which revealed no details of the false income tax reporting charge against him.

> In January 2003, [Pavledes] was the Director of the Cobo Civic Center in Detroit, Michigan. At that time, [Pavledes] accepted an illegal payment of about $100,000 in cash from a Cobo contractor named Karl Kado, owner of Metro Services Organization, Inc. (MSO), in connection with [Pavledes's] performance of his duties.

Blanton pleaded guilty to obstruction of justice, and agreed that the following pertinent facts constituted an accurate basis to support his plea:

> In or about May 2005, while serving as Director of the Cobo Civic Center in Detroit, Michigan, [Blanton] accepted $15,000 in illegal payments from Karl Kado, a city contractor who held electrical, janitorial and food contracts at Cobo Hall. [Blanton] accepted the money knowing that it was given with the expectation that [Blanton] would provide favorable treatment to Kado in [Blanton's] official capacity as Director of the Cobo Civic Center.

Even assuming that these agreements qualify as substantively admissible evidence, they do not suffice to satisfy defendant's initial burden, in the context of this motion for summary disposition, to support its position that the cleaning services contract should not be enforced because it is contrary to public policy. Pavledes's stipulation reveals no details concerning the nature of Kado's "illegal payment" or how it had any connection to Pavledes's duties. The factual premise for Blanton's plea supports a reasonable inference that Kado paid him a bribe. It also arguably supports an inference that Kado sought favorable treatment with respect to all of the specified contracts between plaintiff and defendant. The timing of the payment appears significant because it occurred shortly before the July 2005 cleaning services contract revision. Like the original contract in 2002, under which defendant allowed plaintiff to replace UNICCO to supply various janitorial and other cleaning services, a contract modification requires mutual assent. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372-373; 666 NW2d 251 (2003).

However, defendant's positions that the cleaning and electrical services contracts were void constitute affirmative defenses. MCR 2.111(F)(3)(a) (a claim that "an instrument . . . is void" is an affirmative defense). The party asserting an affirmative defense has the burden of producing evidence to support it. *Attorney General v Bulk Petroleum Corp*, 276 Mich App 654 , 664; 741 NW2d 857 (2007). "[W]here the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted." *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 365; 480 NW2d 275 (1991). "Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *Id*. at 364.

Viewed in the light most favorable to plaintiff, the factual basis for Blanton's plea, even if deemed credible, contains conclusionary rather than substantive information. It does not reveal details concerning the words exchanged between Blanton and Kado, or any specific circumstances surrounding Kado's payment to Blanton, that would assist a trier of fact in determining the basis for (1) Blanton's claimed knowledge that Kado had given him money in anticipation of favorable treatment, or (2) to what extent, if any, anticipated favorable treatment had a relationship to some or all of plaintiff's contracts. Given the conclusionary nature of the

factual bases underlying each plea agreement, the circuit court improperly granted defendant's motion for summary disposition. Defendant's failure to satisfy its initial burden of showing a nexus between the "illegal payments" and the cleaning services contract in particular, or defendant's asserted liability for $1.75 million pursuant to the cleaning services contract, precluded the circuit court from granting defendant's motion. *Quinto*, 451 Mich at 362. Accordingly, in Docket No. 292052, we reverse the circuit court's summary disposition order in LC No. 08-014413-CK.[3]

We reach this same conclusion with respect to plaintiff's challenge to the circuit court's summary disposition decision relating to the electrical services contract at issue in Docket No. 292588. Plaintiff's claim for unpaid electrical services rests on several open invoices, identified by reference to amount, invoice number, and date, for the period between November 3, 2003 and July 5, 2006. Defendant relied on the same evidence of Pavledes's and Blanton's plea agreements in their federal criminal cases to factually substantiate its affirmative defense that the electrical services contract was similarly void because its enforcement would contravene public policy. In opposition to defendant's motion, plaintiff submitted an affidavit of Justin Lawrence, who held various managerial positions with plaintiff during the relevant period. Lawrence averred in part that the parties had made unsuccessful attempts to settle the matter in 2006. Other documentary evidence showed that the electrical services contract, as amended in 2002, was due to expire in June 2005, shortly after Blanton received the $15,000 payment in May 2005. Evidence also showed that Pavledes wrote a letter to Kado confirming defendant's approval of an assignment of the electrical services contract from Trade Show Electrical to plaintiff, dated February 5, 2003, shortly after the date when Pavledes stipulated in his plea agreement that he received an illegal payment of approximately $100,000. Lawrence's affidavit documenting that he "later learned" details of the illegal payments to Pavledes and Blanton raises the same conclusionary concerns inherent in the stipulations underlying Pavledes's and Blanton's plea agreements. An affidavit must set forth with particularity facts admissible as evidence. MCR 2.119(B)(1); see also *SSC Assoc Ltd Partnership*, 192 Mich App at 364.

Because defendant premised its motion for summary disposition of the electrical services contract on the same stipulations in the plea agreements that we have previously deemed conclusory and insufficient to substantiate defendant's position that the contracts should be found unenforceable as against public policy, the circuit court likewise improperly granted defendant's motion for summary disposition of the electrical services contract under MCR 2.116(C)(10). Defendant's failure to satisfy its initial burden of showing a sufficient nexus between the illegal payments, the electrical services contract, and defendant's alleged liability for the outstanding invoices for electrical services, proves fatal to defendant's motion.

Moreover, we readily distinguish this case from *Mahoney*, 304 Mich 694, on which the circuit court expressly relied in granting defendant summary disposition concerning the electrical

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[3] In light of our decision to reverse the circuit court's summary disposition decision in Docket No. 292052, we need not consider plaintiff's challenge to the court's denial of its motion for reconsideration.

services contract. The plaintiff in *Mahoney* filed suit to enforce an oral contract, the terms of which obligated the plaintiff to engage in illegal activity, namely the "use[] or attempted . . . use[] [of] political connections, influence, and pressure in his contracts with architects and contractors." *Id*. at 695-704. Alternatively phrased, an improper purpose permeated the contract and served as the foundation of the agreement that the plaintiff sought to enforce. *Id*. at 704-705. By contrast, the cleaning and electrical services contracts involved entirely legal activities. In light of the evidence before the circuit court when it granted defendant summary disposition, the cleaning and electrical services contracts were at most "remotely connected with an illegal act." *Device Trading, Ltd*, 105 Mich App at 521. Therefore, in Docket No. 292588, we reverse the circuit court's summary disposition order in LC No. 08-018094-CK.

Although we have concluded that the stipulations in the plea agreements, even if accepted as substantively admissible, do not suffice to substantiate defendant's affirmative defense, we will briefly address plaintiff's arguments regarding the admissibility of the plea agreements in the event this issue arises on remand. Plaintiff contends that the stipulations in the plea agreements consist of inadmissible hearsay or fall subject to exclusion under MRE 403.

Defendant does not dispute that the factual stipulations in the plea agreements are hearsay, MRE 801, but argues that they are nonetheless admissible under the catch-all exception in MRE 803(24). The appearance of a factual stipulation in a plea agreement does not render it admissible under MRE 803(24). Cf. *In re Slatkin*, 525 F3d 805, 811-813 (CA 9, 2008) (ruling on the admissibility of a plea agreement, made under oath, pursuant to FRE 807, which contains admissibility prerequisites similar to those in MRE 803(24)), and *United States v Hawley*, 562 F Supp 2d 1017, 1054 (ND Iowa, 2008) (finding plea agreements inadmissible under FRE 807). A court must examine the circumstances of each case to determine whether evidence qualifies as admissible under MRE 803(24). *People v Katt*, 468 Mich 272, 293; 662 NW2d 12 (2003).

The limited record developed in the circuit court does not establish an adequate foundation for applying MRE 803(24) to the stipulations. No factual development exists with respect to the actual circumstances of the pleas tendered by Pavledes or Blanton to aid a court in determining whether the stipulations have circumstantial guarantees of trustworthiness, especially with respect to any details surrounding the illegal payments that plaintiff disputes. Furthermore, defendant has not explained why either Pavledes or Blanton could not be deposed about the details underlying the payments and how they might relate to the contracts at issue. The "best evidence" requirement of MRE 803(24) presents a high bar that effectively limits the rule to exceptional circumstances. *Katt*, 468 Mich at 293. Here, the limited record developed below does not establish a sufficient foundation for concluding that the factual stipulations in the plea agreements are admissible under MRE 803(24). Without a proper foundation for admitting the evidence, it becomes unnecessary to consider whether MRE 403 would provide a basis for otherwise excluding the evidence.

Reversed and remanded in both cases for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly

ZAHRA, J. did not participate.